

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

LAUSTEVEION JOHNSON,

Plaintiff,

v.

D. GREGOIRE, *et al.*,

Defendants.

Case No. 3:22-cv-00095-ART-CSD

**ORDER GRANTING, IN PART, AND
DENYING, IN PART,
MOTION TO DISMISS AND
DENYING MOTION FOR HEARING**

[ECF Nos. 35, 40]

Plaintiff Lausteveion Johnson, a Nevada prisoner, has filed a civil rights complaint by an inmate. (ECF No. 6 (“Complaint”).) Currently before the Court is the Defendants’ motion to dismiss the Complaint as duplicative. (ECF No. 35.) Johnson responded to the motion and moved for oral argument, and the Defendants replied. (ECF Nos. 37, 39, 40.) For the reasons discussed below, the motion to dismiss is granted, in part, and denied, in part, and the motion for hearing is denied.

I. Procedural history and background

Johnson’s Complaint in the instant case (hereinafter “*Johnson I*”) was received by this Court on February 16, 2022. (ECF No. 1.) A screening order was entered on July 25, 2022, and pursuant to the screening order, the Complaint was filed on July 26, 2022. (ECF Nos. 5, 6.) *Johnson I* was stayed to allow Johnson and the Defendants an opportunity to settle their dispute. (ECF No. 5 at 15.) *Johnson I* was later excluded from the early mediation program, and the stay was lifted. (ECF Nos. 8, 9.)

Johnson filed an allegedly similar complaint in a different case (hereinafter “*Johnson II*”): *Johnson v. Cornfield, et al.*, 3:22-cv-00108-MMD-CSD. The complaint in *Johnson II* was received by this Court on February 28, 2022. (3:22-cv-00108-MMD-CSD, ECF No. 1-1.) A screening order was entered on May 18, 2022, staying *Johnson II* to allow Johnson and the Defendants an opportunity to settle their dispute. (3:22-cv-00108-MMD-CSD, ECF No. 4.) *Johnson II* was also

1 excluded from the early mediation program, and the stay was lifted. (3:22-cv-
2 00108-MMD-CSD, ECF No. 7.) Pursuant to the post-stay order, the complaint
3 was filed on June 10, 2022. (3:22-cv-00108-MMD-CSD, ECF No. 8.)

4 The Defendants move to dismiss the Complaint in *Johnson I*, arguing that
5 it is factually identical and maliciously duplicative of the complaint filed in
6 *Johnson II*, and ask this Court to issue a strike against Johnson. (ECF No. 35.)

7 **II. Legal standard**

8 This Court has “discretion to dismiss a duplicative later-filed action, to stay
9 that action pending resolution of the previously filed action, to enjoin the parties
10 from proceeding with it, or to consolidate both actions.” *Adams v. Cal. Dep’t of*
11 *Health Servs.*, 487 F.3d 684, 688 (9th Cir. 2007), *overruled on other grounds by*
12 *Taylor v. Sturgell*, 553 U.S. 880 (2008). This is because “[p]laintiffs generally have
13 no right to maintain two separate actions involving the same subject matter at
14 the same time in the same court and against the same defendant.” *Id.* (internal
15 quotation marks omitted). “[I]n assessing whether the second action is duplicative
16 of the first, we examine whether the causes of action and relief sought, as well as
17 the parties or privies to the action, are the same.” *Id.* at 689.

18 “To ascertain whether successive causes of action are the same,” this Court
19 “use[s] the transaction test, developed in the context of claim preclusion. Whether
20 two events are part of the same transaction or series depends on whether they
21 are related to the same sets of facts and whether they could conveniently be tried
22 together.” *Id.* (internal quotation marks omitted). In applying this test, four
23 criteria are examined:

- 24 (1) whether rights or interests established in the prior judgment
25 would be destroyed or impaired by prosecution of the second action;
26 (2) whether substantially the same evidence is presented in the two
27 actions; (3) whether the two suits involve infringement of the same
28 right; and (4) whether the two suits arise out of the same
transactional nucleus of facts.

1 *Id.* The last criteria is the most significant. *Id.*

2 **III. Discussion**

3 **A. The allegations made in *Johnson I***

4 In *Johnson I*, Johnson sued seven defendants for events that took place at
 5 Warm Springs Correctional Center (“WSCC”): Defendants Correctional Officer
 6 (“C/O”) D. Gregoire, Phoenix Program Counselor Cornfield, Fiess, Caseworker V.
 7 Meza, C/O R. Nerson, Sergeant C. Mahram, and NDOC Director Charles Daniels.
 8 (ECF No. 6 at 1–2.) Johnson brought four claims and alleged the following facts.¹
 9 (*Id.* at 3–13.)

10 On September 21, 2021, Defendant Cornfield, Johnson’s Phoenix Program
 11 counselor, threatened to have a white prison gang called the Aryan Warriors
 12 assault Johnson, file a false notice of charges (“NOC”) against Johnson, get
 13 Johnson removed from the Phoenix Program, and get Johnson booked on new
 14 charges by sending synthetic marijuana in his name. (*Id.* at 3, 8.) On September
 15 28, 2021, Defendant Cornfield called six Aryan Warrior inmates into his office
 16 and showed them Johnson’s criminal charges to get those six inmates to assault
 17 and kill Johnson. (*Id.* at 6, 8.) On October 5, 2021, and October 6, 2021,
 18 Defendants Cornfield, Gregoire, Meza, and Feiss forced Johnson to move from a
 19 bottom bunk to a top bunk, knowing he was physically unable to do so. (*Id.* at 9.)
 20 Defendants Cornfield, Gregoire, Meza, and Fiess wrote a false NOC against
 21 Johnson and removed him from the Phoenix Program. (*Id.*) These four retaliatory
 22 actions were made because Johnson is black, is Muslim, and told Defendant
 23 Cornfield that he would file a lawsuit against him.² (*Id.* at 8.) Additionally, the
 24 first retaliatory action was also made because Johnson told a fellow inmate who
 25 had recently converted to Islam that he could wear his Islamic religious cap called

26 ¹These facts have been taken from the screening order in *Johnson I*.

27 ²According to Johnson, on September 21, 2021, Johnson threatened to sue
 28 Defendant Cornfield for telling Johnson that he could not practice his religion.
 (ECF No. 1-1 at 5.)

1 a Kufi, and the fourth retaliatory action was also made because Johnson filed an
2 emergency grievance on October 5, 2021. (*Id.* at 8–9.)

3 Defendants Gregoire, Cornfield, Fiess, Meza, Nerson, Mahram, and Daniels
4 had knowledge of the atrophy and arthritis in Johnson’s back and knee³ that
5 prevented him from physically being able to climb into a top bunk. (*Id.* at 10.)
6 Despite this, these Defendants ordered Johnson to be moved to a top bunk. (*Id.*)
7 Johnson attempted to climb into his newly assigned top bunk twice on October
8 5, 2021, and October 6, 2021, but he fell on both occasions, causing injuries to
9 his back, knees, hip, and legs. (*Id.*) Johnson submitted an emergency grievance
10 on this issue on October 5, 2021, but in response, Defendants Gregoire and
11 Cornfield filed an NOC against Johnson on October 6, 2021. (*Id.* at 6.) Defendants
12 Meza, Nerson, and Mahram denied the emergency grievance, ordering Johnson
13 to move to the top bunk. (*Id.* at 7.) Defendant Daniels failed to properly hire and
14 train staff regarding treatment of serious medical conditions, resulting in staff
15 members forcing Johnson to climb into the top bunk against his physical
16 limitations. (*Id.* at 10–11.)

17 Defendant Cornfield told Johnson on September 18, 2021, and September
18 21, 2021, that Johnson could not exercise his spiritual duty of instructing a
19 fellow inmate that that fellow inmate could wear his Kufi. (*Id.* at 12.)

20 Defendants Meza, Gregoire, and Cornfield wrote an NOC on October 6,
21 2021, and removed Johnson from the Phoenix Program because he is Muslim
22 and black. (*Id.* at 13.) Contrarily, Defendants Meza, Gregoire, and Cornfield did
23 not write up or remove any Christians or Caucasians from the program. (*Id.*)

24 Based on these allegations, Johnson brought a First Amendment
25 retaliation claim, an Eighth Amendment claim for deliberate indifference, a First
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27 ³According to Johnson, these conditions were caused from being assaulted by 12
28 to 15 staff members in 2012 and then being forced into solitary confinement for
537 days. (ECF No. 1-1 at 2–3.)

Amendment free exercise of religion and Religious Land Use and Institutionalized Persons Act (“RLUIPA”) claim, and a Fourteenth Amendment equal protection claim. (*Id.* at 8–13.) The Court liberally construed Johnson’s second claim as an Eighth Amendment claim based on unsafe prison conditions. (ECF No. 5 at 5.)

B. The allegations made in *Johnson II*

In *Johnson II*, Johnson sued sixteen defendants for events that took place at WSCC: Defendants Cornfield, Kirk Widmar, Richard Ashcraft, V. Meza, Rynerson, Fernandez, Holloway, Suwe, Travis Fratis, D. Gregoire, Barrius, K. Fond, Coltrin, Charles Daniels, Fiess, and Ambaker. (3:22-cv-00108-MMD-CSD, ECF No. 8 at 1–3.) Johnson brought three claims and alleged the following facts.⁴ (*Id.* at 4–20.)

Defendant Cornfield, Johnson’s counselor, told Johnson that if he completed the Phoenix Program, Johnson would “automatic[ally]” receive parole. (*Id.* at 4–5.) Johnson’s failure to complete the program, by contrast, would result in “an automatic denial of parole.” (*Id.* at 5.) On September 7, 2021, Defendant Cornfield said that “there were too many Black inmates in the Phoenix Program, and he didn’t like that.” (*Id.*) Johnson is Black; Defendant Cornfield is white. (*Id.*)

Johnson served as the imam for the Muslims in Unit 2. (*Id.*) Around September 15, 2021, Johnson converted a white inmate named Jordan Davis to Islam. (*Id.*) Several days later, Davis was wearing a kufi cap in accordance with Johnson’s instructions. (*Id.*) Defendant Cornfield told Davis that Davis could not wear a kufi because he was “not Black or Muslim.” (*Id.*) Johnson responded that Davis could wear a kufi, and that Defendant Cornfield was violating the free exercise clause of the RLUIPA. (*Id.*)

On September 21, 2021, Defendant Cornfield told Johnson that Johnson should not have said Davis could wear a kufi. (*Id.*) Johnson replied, “I [] will sue

⁴These facts have been taken from the screening order in *Johnson II*.

1 you over th[ese] 1st Amendment[] and RLUIPA violations.” (*Id.*) In response,
2 Defendant Cornfield said that he had “rank” in the “A-Dubbs,” a white
3 supremacist prison gang, and that he could “get [Johnson] assaulted,” write him
4 up, kick him out of the Phoenix Program, cause his parole to be denied, and “send
5 spice (synthetic marijuana) in [Johnson’s] name.” (*Id.*) Defendant Cornfield also
6 “spoke about” breaking his supervisor’s eye socket if she “trie[d] to fire him.” (*Id.*
7 at 6.) He claimed to have “already researched the medical cost” of such an
8 assault—“\$2,500.” (*Id.*) Johnson said he would “never allow that to happen,” and
9 Johnson began filing kites and grievances about Defendant Cornfield’s
10 misconduct. (*Id.*)

11 On September 28, 2021, Defendant Cornfield called members of the A-
12 Dubbs and another white supremacist gang into his office. (*Id.*) He solicited the
13 gang members to attack Johnson by showing them Johnson’s “criminal charges
14 on the computer.” (*Id.*) The gang members then tried to assault Johnson, but they
15 could not “move on the matter because the Black inmates . . . supported
16 [Johnson] physically and wouldn’t allow them to jump [Johnson] without [there]
17 being an all-out riot.” (*Id.*)

18 Defendant Cornfield “came up with another tactic” after he failed to get the
19 gang members to assault Johnson. (*Id.*) Specifically, Defendant Cornfield solicited
20 Johnson’s cellmate Harrison to assault him. (*Id.*) Harrison agreed to assault
21 Johnson on the condition that the two remain cellmates after the assault. (*Id.* at
22 6–7.)

23 On October 5, 2021, Defendants Gregoire, Cornfield, and Meza ordered
24 Johnson “to move from the bottom bunk to the top bunk” despite knowing that
25 Johnson had been assigned to the bottom bunk due to a “sever[e] back and knee
26 injury.” (*Id.* at 6.) Johnson repeatedly told these Defendants that Johnson was
27 “physically incapable of climbing to the top bunk because of his physical
28 disability.” (*Id.*) Their response: “We know that you are assigned to the bottom

1 bunk, but we're now assigning you to the top bunk." (*Id.* at 6–7.) Johnson filed a
2 grievance about the issue on October 5. (*Id.* at 7.) Defendants Rynerson, Gregoire,
3 and Cornfield then told Johnson, "Now that you grieved the issue, if you don't get
4 on the top bunk, [you will] be written up and terminated from the Phoenix
5 Program and [have your] parole denied." (*Id.*) Johnson subsequently tried to climb
6 to the top bunk twice, falling "violently to the concrete floor" and injuring himself.
7 (*Id.*)

8 On the morning of October 6, 2021, Harrison told Johnson that Defendant
9 Cornfield had ordered him to assault Johnson. (*Id.*) That same day, Johnson filed
10 a grievance about the issue. (*Id.*) Johnson then asked Hilledabrand, a caseworker,
11 to move him out of his cell. (*Id.*) Hilledabrand agreed, giving Johnson a bottom-
12 bunk assignment in a new cell later that day. (*Id.*) That afternoon, Defendants
13 Cornfield, Gregoire, and Meza wrote Johnson up for "not physically being able to
14 climb to the top bunk on 10/5/21." (*Id.*) This caused Johnson to be "terminated
15 from the Phoenix Program." (*Id.*)

16 Defendant Fratis served Johnson with the notice of charges on October 24,
17 2021. (*Id.* at 8.) At the hearing, Johnson showed Defendant Fratis his medical
18 records and a lawsuit in which "the federal court ruled in [Johnson's] favor
19 regard[ing] his medical disability . . . and not being able to get on the top bunk."
20 (*Id.*) Concluding that these records showed the NDOC had "been aware of this
21 issue for years," Fratis "dismissed" the charges as "baseless." (*Id.*) As a result of
22 the dismissal, Johnson was reinstated to the Phoenix Program on October 26,
23 2021. (*Id.*)

24 After the dismissal, Defendants Cornfield and Gregoire asked Johnson,
25 "How did your [notice of charges] get dismissed[?]" It [] was not supposed to get
26 dismissed." (*Id.*) Defendant Cornfield then had staff members "berate" Defendant
27 Fratis for dismissing the charges. (*Id.*)

28 On November 10, 2021, Defendants Cornfield, Gregoire, Meza, Ashcraft,

1 Fiess, Rynerson, Fernandez, Holloway, and Suwe told Johnson that he needed
2 “to move from the bottom bunk [in his current cell] to the top bunk” in a new cell
3 with Harrison. (*Id.*) These officials knew that Harrison had “promised to assault
4 [Johnson] if they were cellmates.” (*Id.*) Indeed, Johnson told them that they could
5 not “force [him] to move into a cell with someone to be sexually assaulted.” (*Id.* at
6 9.) Defendant Gregoire responded, “You have to go into the cell.” (*Id.*)

7 At this point, Johnson spoke with Defendants Meza and Ashcraft,
8 informing them about “the top bunk medical issue and [the] threat of sexual
9 assault by Harrison.” (*Id.*) During this conversation, Defendant Meza said, “No! I
10 will not accommodate you. You have to face your fears and move into the cell
11 with Harrison because you never kited medical on this issue to date!” (*Id.*) When
12 Johnson showed Defendant Meza the kites he had submitted about “falling from
13 the top bunk,” Defendant Meza replied, “I don’t care! Face your fears . . . and
14 move into the room with Harrison. I [] won’t accommodate you because you filed
15 a lawsuit on this issue (2:19-cv-00232) and because you filed grievances against
16 me [] and staff [] weeks ago. So move into the cell with Harrison or I’ll write you
17 up, kick you out of the program[,] and send you to the hole.” (*Id.*) Johnson stated
18 that he would file grievances about these issues; Defendant Meza said, “It’s not
19 grievable.” (*Id.* at 9–10.)

20 Johnson returned to his unit, obtained an emergency grievance from
21 Defendant Gregoire, and filed the grievance at 9:52 a.m. on November 10, 2021.
22 (*Id.* at 10.) Defendant Gregoire then said, “I’m[] going to write you up for filing
23 this fucking grievance you fucking [n-word]!” (*Id.*) Defendant Gregoire proceeded
24 to call Johnson the n-word from 9:55 a.m. “to approximately 11:30 a.m.” (*Id.*)

25 Later that day, Defendants Rynerson, Fernandez, Holloway, and Suwe
26 came to Johnson’s cell and “discussed having to move to [the new cell] with
27 inmate Harrison.” (*Id.*) Johnson told them he could neither access the top bunk
28 nor share a cell with Harrison. (*Id.*) Johnson added that “he had been written up

1 for this issue weeks before,” and the charges were “dismissed as baseless.” (*Id.*)
2 Johnson gave these Defendants the dismissed notice of charges, which they then
3 took up to “administration” to inquire about why Defendants Gregoire, Meza, and
4 Cornfield were trying to “write [Johnson] up for an issue that he was just written
5 up on and dismissed.” (*Id.*) Defendants Rynerson, Fernandez, Holloway, and
6 Suwe returned, informing Johnson that Defendants Ashcraft, Meza, and Fond
7 believed the new notice of charges would “not turn out the same way as the last
8 one” because Johnson had “already filed a lawsuit on this issue.” (*Id.* at 10–11.)
9 Defendants Rynerson, Fernandez, Holloway, and Suwe then ordered Johnson to
10 move into the new cell with Harrison or be “written up[,] sent to the hole[,] and
11 kicked out of the Phoenix Program.” (*Id.* at 11.) Johnson refused to move in with
12 Harrison. (*Id.*) As a result, Defendant Gregoire wrote Johnson up, causing
13 Johnson to be sent to the hole and kicked out of the program. (*Id.*) Defendant
14 Fratis served the notice of charges on Johnson, saying that Defendant Ashcraft
15 had told him “not to even consider dismissing [the charges] because we have to
16 find you guilty.” (*Id.*)

17 Defendant Barrius was Johnson’s caseworker while Johnson was in the
18 hole. (*Id.*) Johnson asked Defendant Barrius if Johnson could return to the
19 Phoenix Program or, alternatively, join the Trust Program, a drug treatment
20 program at Southern Desert Correctional Center. (*Id.*) Defendant Barrius told
21 Johnson that (i) he could not return to the Phoenix Program because “Harrison
22 threatened to sexually assault [him],” and (ii) he could not participate in the Trust
23 Program because Defendants Ambaker and Fiess had said his inability to “climb
24 [to] the top bunk” disqualified him. (*Id.* at 11–12.) Johnson responded, “This is
25 retaliation! I need a grievance[.]” (*Id.* at 12.) Defendant Barrius said the issue was
26 not “grievable.” (*Id.*)

27 On December 2, 2021, Johnson was transferred from WSCC to Northern
28 Nevada Correctional Center. (*Id.*) Two months later, on February 3, 2022, the

1 latest notice of charges against Johnson was “dismissed” as “baseless.” (*Id.*)

2 Based on these allegations, Johnson brought a First Amendment
3 retaliation claim, an Eighth Amendment claim for deliberate indifference, and a
4 Fourteenth Amendment equal protection claim. (*Id.* at 13, 17, 19.) The Court
5 liberally construed Johnson’s second claim as an Eighth Amendment claim based
6 on unsafe prison conditions. (3:22-cv-00108-MMD-CSD, ECF No. 4 at 7–8.)

7 **C. Comparison of the causes of action in *Johnson I* and *Johnson II***

8 **1. First Amendment retaliation claims**

9 In *Johnson I*, Johnson alleged that (1) in response to Johnson threatening
10 to sue Defendant Cornfield, Defendant Cornfield threatened to have the Aryan
11 Warriors assault Johnson, to file a false NOC against Johnson, to get Johnson
12 removed from the Phoenix Program, and to get Johnson booked on new charges
13 by sending synthetic marijuana in his name; (2) in response to Johnson
14 threatening to sue Defendant Cornfield, Defendant Cornfield tried to get inmates
15 to assault and kill Johnson; (3) in response to Johnson threatening to sue
16 Defendants Cornfield, Defendants Cornfield, Gregoire, Meza, and Feiss forced
17 Johnson to move to a top bunk; and (4) in response to Johnson threatening to
18 sue Defendants Cornfield and Johnson filing an emergency grievance,
19 Defendants Gregoire, Meza, and Fiess wrote a false NOC against Johnson and
20 removed him from the Phoenix Program. (ECF No. 6 at 8–9.)

21 In *Johnson II*, Johnson alleged that (1) in response to Johnson threatening
22 to sue Defendant Cornfield, Defendant Cornfield tried to have Johnson assaulted;
23 (2) in response to Johnson filing a grievance complaining about his top bunk
24 assignment, Defendants Rynerson, Gregoire, and Cornfield threatened to write
25 Johnson up and cause his parole application to be denied; (3) in response to
26 Johnson filing lawsuits and grievances about the top-bunk issue and Harrison’s
27 threats, Defendant Meza threatened to write Johnson up and send him to the
28 hole; (4) in response to Johnson filing an emergency grievance about his

1 encounter with Defendants Meza and Ashcraft, Defendant Gregoire wrote
2 Johnson up. (3:22-cv-00108-MMD-CSD, ECF No. 8 at 5–11.)

3 In both *Johnson I* and *Johnson II*, Johnson alleges the following First
4 Amendment retaliation claim: in response to Johnson threatening to sue
5 Defendant Cornfield, Defendant Cornfield tried to have Johnson assaulted. In his
6 response to the motion to dismiss, Johnson admits that this claim is duplicative
7 and should be dismissed. (ECF No. 37 at 5.) As such, the portion of claim 1(a)
8 alleging that Defendant Cornfield threatened to have the Aryan Warriors assault
9 Johnson and claim 1(b) are dismissed with prejudice. The remainder of the claims
10 in *Johnson I* and *Johnson II* do not share the same facts.

11 **2. Eighth Amendment claims**

12 In *Johnson I*, Johnson alleged that Defendants Gregoire, Cornfield, Meza,
13 Nerson, and Mahram assigned Johnson to a top bunk on October 5, 2021, and
14 October 6, 2021.⁵ (ECF No. 6 at 10–11.) In *Johnson II*, Johnson alleged that (1)
15 Defendant Cornfield recruited other inmates to attack Johnson, (2) Defendants
16 Gregoire, Cornfield, and Meza assigned Johnson to a top bunk on November 10,
17 2021, and (3) several Defendants ordered Johnson to move into a new cell with
18 Harrison.⁶ (3:22-cv-00108-MMD-CSD, ECF No. 8 at 5–7, 17–18.)

19 Although the single Eighth Amendment claim based on unsafe prison
20 conditions in *Johnson I* is similar to the second Eighth Amendment claim based
21 on unsafe prison conditions in *Johnson II*, the claims arise out of instances
22 occurring on different dates: October 5, 2021, in *Johnson I* and November 10,
23 2021, in *Johnson II*. Indeed, in *Johnson II*, Johnson references the prior incident
24 from *Johnson I*, further supporting the conclusion that these claims are not the
25 same: “this same order caused Plaintiff to violently fall to the concrete floor

26 ⁵The Court dismissed Defendants Fiess and Daniels from this claim. (ECF No. 5
27 at 9–10.)

28 ⁶The Court found the third allegation to be insufficient to support a colorable
claim. (3:22-cv-00108-MMD-CSD, ECF No. 4 at 13.)

1 repeatedly injuring himself. He was still injured on 11/10/21 due to these
 2 defendant's cause [sic] him injuries on 10/5/21." (*Id.* at 17.) Moreover, the claim
 3 in *Johnson I* is brought against two additional defendants than the similar claim
 4 in *Johnson II*. Consequently, this Court finds that the claims in *Johnson I* and
 5 *Johnson II* do not share the same facts.

6 **3. Fourteenth Amendment equal protection claims**

7 In *Johnson I*, Johnson alleged that on October 6, 2021, Defendants Meza,
 8 Gregoire, and Cornfield wrote an NOC against him and removed him from the
 9 Phoenix Program because he is Muslim and black. (ECF No. 6 at 13.) In *Johnson*
 10 *II*, Johnson alleged that on November 10, 2021, Defendant Cornfield tried to have
 11 Johnson assaulted and assigned to a top bunk because he is black, Defendant
 12 Gregoire sent Johnson to the hole for being black, Johnson was targeted for an
 13 attempted assault because he is a Muslim, and Defendant Cornfield told another
 14 inmate that he could not wear a kufi because he was "not Black or Muslim."
 15 (3:22-cv-00108-MMD-CSD, ECF No. 8 at 5–11, 19–20.)⁷ The specific Fourteenth
 16 Amendment equal protection claim in *Johnson I* was not raised in Johnson's
 17 Fourteenth Amendment equal protection in *Johnson II*.

18 **4. RLUIPA**

19 In *Johnson I*, Johnson alleged that Defendant Cornfield told him that he
 20 "could not exercise his spiritual duty by instructing [a fellow inmate] that [that
 21 fellow inmate] could wear his Kuffi." (ECF No. 6 at 12.) Although Johnson
 22 included these same factual allegations in *Johnson II* (see 3:22-cv-00108-MMD-
 23 CSD, ECF No. 8 at 5), he did not bring a RLUIPA claim in *Johnson II*. Indeed,
 24 rather than including these factual allegations to support a RLUIPA claim, these
 25 factual allegations were included in *Johnson II* to show the catalyst for one of
 26 Johnson's retaliation claims.

27 ⁷This Court dismissed Johnson's last two theories without prejudice. (ECF No. 4
 28 at 15.)

D. Comparison of the parties/privies in *Johnson I* and *Johnson II*

Excluding the defendants that were dismissed, Johnson sued Gregoire, Cornfield, and Meza in both *Johnson I* and *Johnson II*. However, importantly, Defendants Nerson⁸ and Mahram are included in *Johnson I* but not *Johnson II*.

E. Conclusion

It is certainly true, as Defendants argue, that the gravamen of *Johnson I* and *Johnson II* concern Johnson’s participation in the Phoenix Program, his bunk assignment, assaults by other inmates, getting retaliatory charges filed against him, and issues surrounding his religion. However, a careful review of the Complaint in *Johnson I* and the complaint in *Johnson II* demonstrates that—with the exception of the retaliation claim against Defendant Cornfield—the facts of Johnson’s claims do not truly overlap, making the underlying fundamental identity of the cases different. *Cf. Mendoza v. Amalgamated Transit Union International*, 30 F.4th 879, 887 (9th Cir. 2022) (“The fact that *Mendoza II* involves somewhat different legal theories and a somewhat broader range of related conduct and damages [than *Mendoza I*] does not alter the underlying fundamental identity of the suits.”). Thus, even though the defendants in *Johnson I* and *Johnson II* were nearly identical, the Court finds that *Johnson I* is not entirely duplicative of *Johnson II*, so a dismissal of the entirety of the Complaint in *Johnson I* and the giving of a strike are not warranted.

Further, although the Complaint in *Johnson I* was filed after the complaint in *Johnson II*—July 26, 2022, versus June 10, 2022—*Johnson II* was commenced after *Johnson I*—February 28, 2022, versus February 16, 2022. Accordingly, the Court notes, without deciding, that the Defendants should have filed their motion to dismiss in *Johnson II*, the “later-filed action.” *Adams*, 487 F.3d at 688.

Finally, Johnson has filed a motion requesting oral argument on the motion

⁸The Court suspects, however, that Defendant Nerson in *Johnson I* and Defendant Rynerson in *Johnson II* may be the same person.

1 to dismiss. (ECF No. 40.) The Court declines to hold an oral argument,
2 determining that the briefs are sufficient to rule on the motion to dismiss.

3 **IV. Conclusion**

4 It is therefore ordered that Defendants' motion to dismiss [ECF No. 35] is
5 granted, in part, and denied, in part, as follows: the portion of claim 1(a) alleging
6 that Defendant Cornfield threatened to have the Aryan Warriors assault Johnson
7 and claim 1(b) are dismissed with prejudice.

8 It is further ordered that Plaintiff's motion for hearing [ECF No. 40] is
9 denied.

10 DATED THIS 16th day of November 2022.

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13 ANNE R. TRAUM
14 UNITED STATES DISTRICT JUDGE
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